

IN THE HIGH COURT OF JUDICATURE OF BOMBAY**CRIMINAL APPELLATE JURISDICTION****CRIMINAL APPEAL NO.930 OF 2003**

Arun Virappa Koli. ..Appellant.

V/s.

The State of Maharashtra. ..Respondent.

Mr.Punit Mahimkar for Smt.Glady Pereira for Appellant.

Mr.V.B.Konde-deshmukh, APP for State.

CORAM: A.M.KHANWILKAR, J**DATE : AUGUST 18, 2006.****ORAL JUDGMENT :**

1. Heard counsel for the parties.

2. This appeal takes exception to the Judgment and order passed by the III Ad-hoc Additional Sessions Judge, Thane dated June 27, 2003 in Sessions Case No.186 of 2002. The appellant alongwith one Shivanand Ambadas Pujari was tried for offence punishable under section 460 r/w 34 of I.P.Code. The trial Court after adverting to the evidence on record has found the appellant guilty of offence under section 459 of I.P.Code and ordered to undergo sentence of Rigorous Imprisonment for five years and to pay fine of Rs.300/- i.d. to suffer S.I. for one month.

3. The counsel for the appellant at the hearing of this appeal confined his argument to the nature of offence and quantum of sentence.

4. Counsel for the appellant fairly submits that the finding regarding the complicity of the Appellant in the commission of offence as recorded by the trial Court will have to be accepted. Even so, contends the learned counsel, having regard to the injury caused to the victim at the relevant time by the appellant as has been proved, the offence cannot be one under section 460 of I.P.Code but a lesser offence under section 458 of I.P.Code and in that case the sentence of five years imposed by the lower Court will have to be reduced. In this Judgment, I shall deal only with this limited aspect, which was argued before me across the bar.

5. For considering the argument with regard to the nature of offence and quantum of sentence, we shall straightway advert to the nature of injuries suffered by the victim during the assault. P.W.9 Dr.Sanjiv had noted following injuries.

"1. Incised wound on right arm medial side about 4 x 2 x 1.5 c.m. bleeding ++. muscle deep.

2. Incised wound on chin right side at

mendible 4 x 2 x 1.5.c.m.bleeding ++.

3. Sharp linear abrasion on right arm about 2 x 1 c.m.

4. Deep incised wound on abdomen left side (not seen properly because - relatives were not interest to show the wound)."

In his examination in chief, he has stated that injury No.4 i.e. deep incised wound on abdomen was grievous injury. P.W.9 has described injury No.4 alone as grievous injury. However, in the cross-examination, this witness candidly concedes that he had not clinically examined injury no.4. If it is so, the prosecution evidence on this aspect- to establish the fact that the appellant caused grievous injury is lacking. Interestingly, the prosecution case was that the victim had also suffered injury on his Chest. However, in the cross examination, P.W.9 has stated that the condition of patient was so critical that he could not thoroughly examine the patient and therefore, he was not in a position to say whether any injury was caused on the chest of the person or not. Learned APP fairly accepts that although the prosecution intended to rely on another medical certificate of Municipal Corporation of Greater Mumbai, but the same has not been proved and exhibited. In the circumstances, we have to rely only on the certificate Exh.30 and the evidence of

P.W.9 who had issued the said medical certificate to ascertain the nature of injury caused to the victim. As P.W.9 has clearly conceded that he did not thoroughly examine the patient and in particular clinically examine the injury No.4, there is no legal evidence to establish the fact that any grievous injury was caused to the victim. Accordingly, even if we were to confirm the finding with regard to the commission of offence of lurking house trespass and house breaking by night, as recorded by the lower Court, the offence punishable however, will be one of section 458 of I.P.Code. For, the nature of other injuries established from the record not being grievous injury, the appellant cannot be held guilty of the offence punishable under section 459 of the I.P.Code.

6. Accordingly, the offence under section 459 of I.P.Code is altered to one of section 458 of I.P.Code and the sentence for that offence is modified to the sentence already undergone by the appellant, which is stated to be 3 years, 3 months and 24 days.

7. Accordingly, this appeal partly succeeds on the above terms. The impugned Judgment and Order is modified to the above extent. The operative order

passed by the Trial Court now stands modified as follows:

"1) The accused No.1(appellant) is convicted for the offence punishable under section 458 of I.P.Code and sentenced to suffer rigorous imprisonment for period already undergone."

2) The appellant is directed to be set at liberty forthwith."

8. All concerned to act on the copy of the operative order passed by this court to be issued duly authenticated by the office.